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ABSTRACT

A study traced the development of state open-meeting laws, beginning with the concept of open access presented in English common law and extending to the present time. Responses to inquiries were solicited from state press association managers. Analysis of the responses received, as well as secondary sources, identified current legislation and categorized major elements of state open-meeting law content. Results suggest that it is difficult to draw any generalizations regarding the laws since they vary greatly from state to state; they are constantly being updated; they are qualified by court decisions and attorneys' general opinions; and they are affected by other legislation and state constitutional requirements. In theory the laws have been designed to facilitate access; in practice there often has been a disparity between the intent and application of open-meeting laws. Although progress has been made toward the establishment of effective open-meeting legislation, there is much to be accomplished. Further study in both behavioral and legal research on topics concerning freedom of information is needed. (DF)

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The Development of State Open-Meeting Laws

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Abstract

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Title of Study: The Development of State Open-Meeting Laws

This study presents the development of state open-meeting laws traced through the use of secondary sources and responses to inquiries solicited from state press association managers. Responses were received from 19 of 50 association managers solicited. The study establishes a history of the legislation beginning with the concept of open access presented in English common law and extending to present time. The study analyzes current legislation and categorizes major elements of state open-meeting law content. Finally, the study discusses recurring problems and new issues to be considered in open-meeting legislation.

PREFACE

More than two hundred years ago, the idea of open government and an informed public led our founding fathers to a revolutionary concept--government built on the foundation of free speech and a free press. That concept--both a principle and an ideal throughout the history of our country--has been both the mainstay of freedom and an elusive goal never quite within reach.

As the nation progressed from frontier to industrialized and then to high-tech society, the paradox endured. Even now, the growth of big government and the explosion of knowledge in a computer-based world have not altered the historic need to nurture freedom of information. That need remains unchanged. What has changed are the situations that now must be confronted to protect those freedoms. Today, freedom of information means not only the free circulation of information, but also--and sometimes even more importantly--free access to information.

During the mid-'70s, access to information became an issue of increasing public interest which culminated in the passage of state and federal legislation increasing access to governmental information. Since that time, public interest and legislative activity have declined in an atmosphere of national conservativism and political disinterest. What concern there is now has been brought forward for the most part by journalists. A recent publication of the Society of Professional Journalists, 1984-85 Freedom of Information Report--Gaining Access (not

available for inclusion at the time this paper was written) summarized major freedom of information issues and included a state-by-state survey of open meetings and records.

Regardless of the degree of public awareness or the strength of political support, freedom-of-information issues exist today. An awareness of these issues and their importance led the writer to undertake this paper, which examines the current status of the freedom-of-information movement by scrutinizing access--access to one major source of information about state and local government: open meetings. While open-meeting laws constitute a substantive legal topic, as well as an opportunity for empirical research, a monographical approach was chosen as the appropriate design for this research. The study has sought to trace the development of today's open-meeting legislation, and analyze the content of current legislation beginning with early concepts of open access in English common law.

INTRODUCTION

Public access to the governmental decision-making process has long been a goal of the press. Together with individuals and various groups representing the public, the press has sought open-meeting legislation in each state as one important means of achieving this goal.

Because an informed electorate is essential to a representative democracy, public awareness of--and participation in--government is vital. Thus the reporting of public business completely and accurately is a basic need, and media access to governmental decision-making is fundamental to American democracy. James Madison expressed the philosophy in these terms:

> Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both.1

With Madison's philosophy as a focal point, this paper will discuss the history and development of state open-meeting legislation, analyze the content of the current legislation, and discuss issues involved in the continuing development of open-meeting legislation. This study presents the development of state open-meeting laws traced through the use of secondary sources and responses to inquiries solicited from state press association managers. Responses were received from 19 of 50 association managers solicited.

Development of the Open-Government Concept

Although the theory of open government has been present since the nation's inception, the practice of government openly conducted has been a long struggle--a struggle begun in England and brought to America with the earliest colonial settlements.

Secret legislative proceedings were practiced in both houses of British Parliament. The original reason for secrecy was fear of reprisal from the Crown for statements made during floor debate.2 This fear subsided during the late 17th Century, but members continued to meet in private in order to withhold information on debates and votes from their constituents.3 As time passed, enforcement of the secrecy resolutions was relaxed and it became custom to admit the public and press to Parliament. Today Parliament encourages rather than suppresses public attendance and the reporting of its proceedings. Nevertheless, "the public has no common-law right to attend meetings of government bodies."4 The gradual evolution from closed to more open sessions of Parliament, instead, represents a matter of Parliament's grace plus long-standing custom.

In Colonial America, English rulers followed the precedent of legislative secrecy practiced by the 18th Century Parliament. Whether operating under trading charters or royal governors, colonial legislatures excluded newsmen from, and barred publication of, their proceedings. Some relaxation of secrecy rules came with the Revolution. Indeed, the struggle for press freedom was one of the objectives of the Revolution itself.5

Freedom of the press was a major concern in the formation of the American Republic. The adoption of the Constitution and the Bill of

Rights guaranteed press freedom, and while it is clear that the freedom of the press guarantee was intended to prohibit prior restraints by government on the press, there is no foundation for the belief that right of access to government was specifically in the minds of those who drafted and approved the First Amendment.6 It is in recent years that the guarantee began to imply to many constitutional theorists the right of public access to government and the right of the press to gather information about government. The primary purpose of the freedom of speech and press clause of the First Amendment, to these theorists, has been "to prevent the government from interfering with the communication of facts and views about governmental affairs."7 The theory is extended by the belief that the First Amendment clause, together with support from the Fifth, Ninth and Fourteenth Amendments, guarantees the people's "right to know" and thus access to governmental meetings. This viewpoint was strengthened by a 1945 Supreme Court opinion in which Justice Black, with Justice Frankfurter offering a concurring opinion, recognized that informing the public is an important interest underlying the guarantees of the First Amendment.8 Regardless of support for the theory, however, the Supreme Court "has not expressly recognized a broad individual right to gather information from an unwilling government entity."9 Therefore, neither in the past nor present has there been any specific Constitutional guarantee of right to access.

Apart from legal development of the concept of free speech and freedom of the press, the attitude of public opinion in 18th Century America was not consistently favorable to open government. There were those early Americans who fully adopted a viewpoint favorable to secrecy

in government. The planning and development of the federal government was conducted in secret at the Constitutional Convention. Moreover, the initial meeting of Congress (1788 Constitution) in March of 1789 was held with the Senate behind closed doors while the House of Representatives met in public.10 It was not until 1794 that the Senate opened its doors to the public.11

Although there was lack of full public and official support for open government, "historical research indicates that the early Republic was characterized by a general openness of information."12 The early Republic also was characterized by government of limited organizational structure. In 1789, during Washington's first administration, the entire executive branch consisted of the departments of State, War and Treasury. In addition, there was an attorney-general and a fledgling post office.13 Aside from secret diplomatic correspondence, access to information about the State Department--which during that period had a total personnel force of less than six--did not present a great problem.14

The Growth of Big Government

The problem of government secrecy accompanied the rise of "big government" beginning in the 1930s and expanded to both foreign and domestic security considerations during the post-World War II period.15 Prior to the post-war period, the custom of and tolerance for openness in government was nurtured by a climate of favorable public opinion and backed by legal precedent. The legal right to attend meetings developed historically as a constitutional and legislative right exercised primarily by state government.16 Following the precedent set by Congress early in the nation's history, state governments have allowed the public

to observe legislative sessions. Before 1953, two states had constitutional provisions specifically requiring their legislatures to have all meetings open to the public, and many states had constitutional provisions permitting public attendance except in certain circumstances.17 In addition, Alabama has had legislation requiring open meetings of state administrative agencies since 1915,18 and most city charters in all states were written requiring open meetings of city councils and similar governing bodies.19

The gains toward open government made during the 19th and early 20th Centuries had, however, by the mid-1950s begun to erode and a tendency toward secrecy was witnessed at all levels of government--local, state and federal.20

After three centuries of progress toward openness in government, there seemed to be--paralleling the rise of the modern, urbanized, industrialized society--a reversal, a regression from openness. This developed as a result of complex and fundamental changes. One author offered this explanation:

> Retrogression has been caused by military crisis, by changes in the structure of government, by expansion in the powers of government, by increases in the sheer size of government and by declining faith in the theories that made it possible to expand popular rights to knowledge from the seventeenth to the twentieth century.21

Further, it was thought by many that the evolution of modern government had, itself, impaired the right of access. These elements of governmental structure were said to be restrictive of access to government:

1. Delegation of legislative power to executive departments and independent agencies.

2. Emigration of legislative business from legislative chambers to legislative committees, at federal and at state levels.

3. Increase of secret sessions at local levels of government.22

The Right to Know

Concerned citizens and the press began to feel a need to know about their government. This growing sentiment was expressed by Kent Cooper, executive director of the Associated Press, as "the right to know." In a speech given January 23, 1945, he argued: "The citizen is entitled to have access to news, fully and accurately presented. There cannot be political freedom in one country, or in the world, without respect for 'the right to know.'"23 The phrase became widely used by the media in editorials and other efforts directed toward openness in government. Later, in a book, The Right to Know, Cooper argued for the adoption of a constitutional amendment to clarify the First Amendment and guarantee the right to know.

Organized activities to promote the right to know had their beginnings in 1950 when the Freedom of Information Committee of the American Society of Newspaper Editors directed its attention to the problem of access to government.24 Among other activities, the Committee sponsored a study by Harold L. Cross, a newspaper attorney and lecturer at Columbia University. The result was a book entitled The People's Right to Know. In the book, Cross defined the problem of access and discussed the need for action at both the state and national level.25

Russell Wiggins, executive editor of the Washington Post and Times Herald and a chairman of the Freedom of Information Committee, sought to explain and further clarify the "right to know" principle in Freedom or

Secrecy, published in 1956. Wiggins argued that the right to know was actually several different rights:

1. The right to get information.
2. The right to print without prior restraint.
3. The right to print without fear of reprisal not under due process.
4. The right of access to facilities and material essential to communication.
5. The right to distribute information without interference by government acting under law or by citizens acting in defiance of the law.26

Wiggins's composite of rights re-enforced the need for open access to governmental proceedings.

The growing concern for open access to government was not met without political controversy. Because there was no apparent constitutional basis, defending open access as a right under the First Amendment was difficult. In addition to the problem of constitutional justification, there were those individuals and groups who opposed the principle. Their concern dealt with the balance of different, unrelated rights, those of privacy and the general public good, with the right to know. Because the "right" appeared "unconditional and unqualified it was, therefore, unacceptable."27

Nevertheless, despite political conflict, the public's right to know and, with it, the movement toward open access to government proceedings, expanded to include individuals, citizens' groups, and all of the professional journalistic organizations.28 In 1957, the American Society of Newspaper Editors extended the pioneering efforts begun by the Freedom of Information Committee by legitimatizing the right to know

in "A Declaration of Principles." This document embodied the basic principles surrounding the right to know.29

As the general campaign for the right to know developed, the movement toward open-meeting legislation also began to grow. In 1957, the same year the American Society of Newspaper Editors issued "A Declaration of Principles," Sigma Delta Chi, now called The Society of Professional Journalists, "began a concentrated effort for adoption of model access legislation in states without such statutes."30 To aid the passage of strong open-meeting legislation, the Society created a model law.

In 1957, only 11 states had laws requiring that meetings of governmental bodies be open to the public.31

The following year, a Freedom of Information Center was opened at the University of Missouri School of Journalism. The Center, through a Freedom of Information Foundation, published yearly reports on the status of the freedom-of-information movement and scholarly research concerning the subject.32

Common Cause, a national citizens' lobbying group, also became active in working toward right-to-know legislation. The group drafted its own model legislation and a statement of principles concerning open-meeting laws.33 Credit for building the need for more openness in government also can be given the Associated Press Managing Editors, the National Editorial Association, and state press associations, which have engaged in numerous educational campaigns concerning the right to know.34

These groups and other proponents of right-to-know legislation offered several arguments to educate the public to the need for

open-meeting laws. The basic argument was: public knowledge of governmental action is essential to the democratic process; under the American democratic system, the people must be informed of government in order to make intelligent judgments on issues and intelligent selection of their representatives.35

Several correlates to this principle were offered to support the need for open meetings, including the invaluable aid of outside observers in ensuring that information is passed to the public. Official reports, it was argued, seldom furnish a complete summary of discussion. The press and interested citizens present at meetings could ensure wider and more accurate dissemination of information.36 In addition, "where the public is able to witness the deliberations which lead to the expenditures of large sums of tax dollars, the misappropriation of funds either by imprudence or dishonesty can be best controlled."37 Conversely, honest lawmakers would be protected from false accusations if proceedings were conducted in a completely open forum.38 Further, since open meetings would permit immediate feedback of public reaction to official action, the meetings were thought to make government more responsive to the public.39 Finally, public meetings were said to foster a better understanding of the demands of government and the significance of particular issues, thus eliminating misconceptions the public might have about government.40

On the other hand, those who opposed open-meeting legislation included government officials who feared open meetings would be detrimental. They thought official actions would be misrepresented by the press, or "even distorted by newsmen in the drive to 'merchandise' the news."41 Some officials were reluctant to speak at open meetings and

were opposed to them because they feared their unrehearsed speech would make them appear foolish in public.42 Another disadvantage cited was that the open-meeting requirement would tend to publicize disagreements.43 Regarding meetings involved with cases of conflict of interest, one public official remarked that "there are many details, ramifications and opinions that no sound administrator . . . would care to express in public."44

Still others, outside government, opposed the legislation. They felt that open meetings provided a stage for public officials to grandstand for their constituents.45 Even among those in the media, some were reluctant to give support because they believed weak laws would be worse than having no laws at all.46 Some newspersons also charged that the laws provided excuses for secrecy. Robert H. Wills, city editor of the Milwaukee Sentinel, thought that Wisconsin's 1959 open-meetings law had done more harm than good. Before the law went into effect, he could walk into a meeting as a reporter and "nobody could throw a law book at me," he said.47 Despite arguments of the opposition, the benefits of open meetings were generally recognized.48 By 1962, 26 states had passed laws requiring open meetings.49 The remaining states moved to enact similar laws and in 1976, New York and Rhode Island became the last to adopt open-meeting laws.50

During the mid-1970s, two events, Vietnam and Watergate, focused unprecedented press and public attention on misuse of power and governmental secrecy at the federal level.51 Measures were taken to correct this abuse of public trust when President Gerald Ford signed into law the Government in Sunshine Act. Although the law, enacted in 1976, lists 10 exceptions, it does provide for open meetings of most federal

agencies.52 Dramatic changes in open-meeting legislation were observed throughout the United States at this time. Many state open-meeting laws were "either adopted or extensively revised at about the time the federal law was enacted."53 The National Conference of State Legislatures considered open meetings a topic revelant to state legislative ethics and drafted a model open-meeting law which was adopted as suggested legislation at the group's Philadelphia meeting in 1975.54 Laws passed after the mid-1970s have resembled the federal law and the National Conference of State Legislatures model law in many respects.

Achieving Balance--The Florida and Tennessee Acts

Open-meeting legislation in general has come to be identified by a popular "catch-all" term, Sunshine Law. The title was derived from the lengthy Florida government-in-the-sunshine deliberations, an influential example of effective law making.55 The Florida Sunshine Act, passed only after 10 years of debate in the Florida state legislature, is exceptionally broad in coverage. Prior to its enactment, several attempts were made during Florida House debates to write exceptions into the bill, but none succeeded.56 The law was passed prohibiting executive sessions; it declared a policy of openness subject only to any exceptions found in the Florida Constitution. In 1973, the law was called the strongest statement to date in the field of open-meeting legislation.57 Numerous court cases have been brought against the statute, yet Florida's Sunshine Act remains, in terms of comprehensive coverage, one of the broadest state open-meeting laws.58

One other state, Tennessee, has passed open-meeting legislation with sweeping coverage. It is the only state whose law has the

distinction of being recognized as "model."59 The Tennessee law alone earned a perfect score in a 1974 nationwide study conducted by John B. Adams, dean of the School of Journalism at the University of North Carolina.60

In this comparative test of comprehensiveness in state open-meeting legislation, Adams rated states on 11 criteria that he developed to describe an ideal law. The scores revealed a wide variation in comprehensiveness of open-meeting laws. Only two states were reported not to have any sort of open meeting law at the time of the survey, but several others had laws which met only one or a few of the criteria suggested. Laws in Arizona, Kentucky and Colorado received a 10 and those in Maine and Minnesota earned a nine.61 Among the 11 criteria, Adams's ideal law included provision for an open legislature and open legislative committees as well as open meetings of state, county and local agencies. The criteria also included a statement of policy, sanctions against violators of the law, and prohibition of closed executive sessions.62

Adams's report, published by the Freedom of Information Foundation, was reviewed and circulated widely.63 Yet despite this national attention, neither the report nor the Tennessee law met with universal approval. Douglas Wickham, a University of Tennessee professor of law, was an outspoken critic. Wickham pointed out a number of deficiencies in the Tennessee law and recommended corrections in a Tennessee Law Review article. He suggested that open-meeting laws should address the "reconciliation of serious value conflicts."64 These value conflicts, in Wickham's view, should not be characterized as "'the right to know' versus the right to secrecy."65 "In reality," he said, "the tension is between the value of having an informed electorate and the value of

preserving the quality of governmental decisions through insulation from unnecessary public exposure."66 He argued that in some instances the general public welfare and the individual's right to privacy were violated by open-meetings legislation. Wickham presented these guidelines to accommodate the conflicting values:

1. A presumption in favor of public access to governmental meetings;
2. A delineation of those situations in which open meetings are not preferred, and
3. Enforcement through meaningful and appropriate sanctions.67

Among the situations in which open meetings were not considered by Wickham to be beneficial were labor negotiations, investigatory proceedings, discussions between a public body and its attorney and personnel matters dealing with hiring, compensation, promotion, discipline and dismissal.68

The Tennessee open-meeting law, in its vast breadth of coverage, had opened virtually all aspects of governmental meetings to the public. Wickham believed that in protecting the public's right to know the law infringed on other rights.69 The principles he developed sought to balance the conflicts encountered in drafting open-meetings legislation.

The controversy surrounding the 1974 Tennessee law was representative of the dilemma encountered by legislators throughout the country as they wrestled with open-meeting legislation. "Although many states . . . sought a common ground, no particular statute stands apart as a successful resolution of the conflict in basic values."70 "Accommodating the valid interest in secrecy, for the consideration of certain subject matter or for preliminary fact gathering and consultation, while preserving the informative values of open discussion" was a serious

problem.71

The broad and comprehensive laws enacted in Tennessee and Florida emphasize the value of openness. Legislation in other states placed more emphasis on "values which require a degree of confidentiality."72 As a result, open-meeting statutes in the 50 states "vary considerably in range and effectiveness. At one end of the spectrum there are laws which, by intent at least, require government . . . in a fish bowl. At the other end lie those laws which . . . are charters for secrecy by reason of the exceptions and qualifications incorporated into the statutory text."73

The Range and Effectiveness of Open-Meetings Legislation

Open-meeting statutes have varied considerably in range and effectiveness, due in part to the inherent difficulties encountered in attempting to balance conflicting values. The variation in effectiveness also has been due to other reasons. A 1962 study cited "poor draftsmanship, resulting in ambiguities and incompleteness in many statutes" and "inadequate statutory treatment of executive sessions."74 Another study, in 1973, reaffirmed the lack of "uniformity or draftsmanship" in the laws.75

Many journalists and other interested citizens who welcomed the idea of open meetings began to regard the resulting legislation as less than desirable. In one study, two out of three editors reported one or more instances during a year's time in which a reporter had been denied access to public records or public meetings.76 Another study surveyed 40 South Dakota journalists and found 49 percent suspected the governmental entity they covered of conducting closed meetings in defiance of

the law.77 In Virginia, journalists found "many local governments utilizing the legal exemption and personnel exemption to evade their responsibility for open meetings under the law."78

Clearly there has been a vast difference between the intent and the application of open-meeting laws. The flaws, hindering implementation, provided opportunity for deliberate manipulation of the statutes. For instance, the 1974 Virginia law could be successfully side-stepped. According to an attorney general's ruling, the appointment of one additional person to a commission or board could permit a reclassification of definition, thus allowing a closed or secret meeting.79 Further examples can be found in the files of the University of Missouri's Freedom of Information Center which are "crammed with case histories of local secrecy problems."80

While broad coverage has come to be accepted as a prerequisite to effective legislation, broad coverage without clarity of definition and explicit directive can create troublesome ambiguities. In Arkansas during the 10-year period between 1969 and 1979 seven Supreme Court decisions, numerous circuit court actions and more than 60 attorney general's opinions involved open-meeting legislation.81 The Arkansas statute is only one example of an open-meeting law that has undergone extensive judicial review. The basis for valuable open-meeting legislation rests not only with broad scope but also with narrow definition.82

Over the years, the most serious complaints regarding ambiguity in open-meeting legislation have concerned executive, or closed, sessions of public bodies.83 In Montana, for example, an executive session may be held at any time the "demand of individual privacy clearly exceeds the merits of public disclosures." However, privacy may be waived by

the individual about whom the discussion pertains.84 Other serious complaints have been directed at the numerous exceptions found in the laws. The state of Delaware lists 13 separate exceptions to the open-meeting requirement.85 The National Association of Attorneys General has prepared a 135-page book dealing solely with exceptions to open-meeting laws--further evidence of the problem's magnitude.86

Recurring problems rise from inadequate definition of the word "meeting." Whether or not informal meetings, subcommittee meetings, meetings of quasi-judicial bodies, party caucuses, private and non-profit organizations that receive state funds, advisory bodies, university faculties, state legislatures, social functions and other circumstances are covered in the legislation varies from state to state.87

Further problems stem from inadequate definitions. In some states, a quorum is necessary to constitute a meeting. In others, such as Florida, any action which is deliberated or taken qualifies as a meeting.88 In a few states, officials are free to close meetings for all purposes except taking a final vote.89

Unless the media and public are informed of meeting times and locations, the requirement of open meetings is virtually worthless.90 "Most states require publication of regular meeting times and places, and require notice of special meetings as well."91 A few, like Colorado and New Mexico, require only that "'full and timely' or 'reasonable'" notice be given.92

Since it is virtually impossible for the press and public to attend every meeting of every public body covered under open-meeting acts, recorded minutes available to the public are an important adjunct to this legislation, even though several states still do not require minutes.

Of the states that require minutes of regular meetings, some exclude the recording of minutes of executive sessions.93

Obtaining enforcement of violations is a major factor hampering the effectiveness of the laws.94 Not all states allow procedures for a general appeal to the courts for injunction to prevent officials from excluding the public.95 Invalidation of action taken at a meeting held in violation of an open-meeting law is provided for in some state laws.96 Penalties for violations vary considerably from state to state.97 Misdemeanor is a typical penalty. At one time during the 1960s, four states authorized removal from office as a penalty.98 The New Hampshire and North Carolina laws require injunction but no penalties.99 Provisions that allow any citizen to sue to enforce the law strengthen enforcement sanctions.100

Aside from legal means, journalists have successfully used a variety of strategems--editorials, letters to members of the public body, photos of the closed door behind which the closed meeting is being held, and the threat of lawsuit to open meetings that otherwise would have been closed.101 The time and costs involved in litigation have prevented many journalists and individual citizens from seeking enforcement.102

The goal of open-meeting legislation in each state was long sought by journalists and a few citizen groups. Once achieved, however, the legislation often has been met with mixed emotions. While most of those concerned with the free flow of information have welcomed the basic principle of the legislation, many have found implementation of the laws somewhat frustrating. This ineffectiveness stems partly from the difficulty of balancing the need for confidentiality and the need for open access.

Basic Content of the Laws

There is, presently, still a great deal of legislative activity updating the laws in many states. Furthermore, numerous court cases and attorneys-general opinions lend interpretation to the laws. The wording of two laws may be almost identical, but the interpretation of those laws may differ greatly from state to state. Even within a state, interpretations of the law may vary from case to case.103 In addition, other legislation and state constitutional requirements affect open-meeting legislation. The general index of the Montana Code Annotated lists 33 separate statutory citations referring to open meetings, in addition to the open-meeting law.104 Presented with these variables, any comprehensive summary of the 50 state laws would be difficult, if not impossible.

More than a dozen law-review articles analyzing open-meeting legislation have been published since the early 1960s. These articles together with scholarly research that approaches the study of open meetings from a social-science perspective, examples of model legislation drafted by various sources, and the example of the federal law present something approximating a consensus on the general content of such laws. Included in an outline of this content is:

1. A statement of purpose: This is a brief statement of the purpose and intent of the law.105

2. Definitions: A formal explanation of what is meant by the terms "meeting," "open" and "action."106

3. Coverage: A description of the categories of governmental organizations included in the legislation.107 Three techniques are generally used: (a) a listing of all affected agencies by name or narrow class, (b) an establishment of criteria broad enough to identify all agencies performing public business and (c) some combination of

(a) and (b).108 Many times the qualification of whether a governmental body spends tax revenues or is supported by tax revenues is used to determine coverage.109 Among the many different exceptions listed by the various states, it generally is found that the courts and judicial proceedings are exempted from coverage as are meetings of state legislatures. Most of these are open to the public through means other than open-meeting legislation.110 Tennessee and Florida are the only states allowing no exceptions for closed, or executive sessions, under the legislation. Many states restrict the subjects of discussion and the method of conducting executive sessions.111 The model legislation of the National Council of State Legislatures legitimizes executive sessions under five conditions: personnel matters (hiring, firing, promotion and discipline), real estate transactions, collective bargaining strategy sessions, labor negotiations and closed public records.112

4. Notice: A statement requiring that information concerning the time and place of meetings be provided the public.113

5. Minutes: A statement requiring detailed minutes be recorded and made available to the public.114

6. Sanctions: A statement providing for enforcement of the provisions of the law. One or more of the following methods of enforcement have at one time or another been adopted by various states: criminal penalties, invalidation of action taken at a meeting closed in violation of the law, injunctions prohibiting officials from excluding the public and removal of violaters from public office. In the past, a few states have had no enforcement measures.115 In many states any citizen can bring suit to force compliance with the law.116

The provisions above are merely generalizations, covering only the major aspects of open-meeting legislation. The laws of each state are specific. Many state laws do not include all of the provisions above. Many states have additional provisions not among those listed above. These six provisions, however, represent an extremely broad overview of current law.

Current Status of Open-Meeting Laws

The movement for access to government preceedings has made enormous strides in recent years.117 Despite the varying scope of coverage from state to state, open-meeting legislation, in general, has been met with favorable response from both journalists and government officials. A study conducted through the University of West Virginia revealed that "both groups believe that open-meeting laws are a good idea."118 Another study showed that overall, county commissioners and city managers in Michigan supported the idea of open meetings. As time has passed even some critics have been won to the cause. A state representative from Tennessee who opposed the passage of his state's 1974 law changed his opinion. "The nightmares I predicted," he wrote, "have not come to be."119 Among journalists who favored the legislation was Mary Lee Quinalty, manager of the New Mexico Press Association. Speaking for association members, Quinalty said, "We had some real loopholes before we got the 1980 law passed; now, we rarely have a problem."120

The historical trend toward open access to government through open-meeting legislation is unmistakable.121 Openness works.

There is, however, a continuing need for reappraisal of the laws. The concerns of open access are not static. Updating of legislation provides for adaptation to changing needs. Modern technological advances have presented two needs not commonly addressed in current open-meeting legislation. One regards recording and broadcasting of meetings. In several states, including Connecticut and Maryland, open-meeting acts have been written permitting the recording, filming and broadcasting of meetings. These provisions have the potential of greatly widening the scope of public access to government.122 The other need

presented by technological advancement may not prove as beneficial to open access. An example from one state provides illustration. Illinois has used teleconference calls to conduct meetings of two state boards and other agencies.123 Robert Ruies, a member of the technological assessment committee of the American Bar Association, has said that "limiting teleconferencing is not likely to happen. The speed . . . makes it a worthwhile venture."124 Others view teleconferencing as circumventing the spirit of public-access legislation. The state of Oklahoma is one state whose law expressly prohibits public bodies from deciding any action or taking any vote in meetings held by telephonic communication.125

The long struggle for open meetings has been successful in terms of general access to governmental bodies. The effectiveness of the legislation as a major weapon against government secrecy is difficult to assess. There is room for improvement. The evidence is ample that "local government carries on much of its business in secret, even in states where laws forbid or restrict the practice. So far, the fight against closed meetings . . . has been waged almost entirely by the more courageous and tough-minded elements of the communication media."126

This excerpt was taken in 1984 from an opinion page of a medium-sized newspaper.

> . . . Then came the closed-door session to 'decide' . . . Why not discuss it hiring a new director out in the open? What's the big secret? It's a common practice among public bodies to go into executive session when they are discussing the hiring or firing of an official. It creates an aura of mystery. But, that is about all it does. It certainly does not promote public trust.127

The editorial is reflective both of secrecy in local government and the

media's continued editorial opposition to that threat.

A further expression of the problems many journalists face in dealing with open-meeting laws has come from Bill Monroe, managing director of the Iowa Press Association.

> Iowa journalists are generally pleased with these laws, but find it's a full-time job making sure that the legislature doesn't water them down. We had over 70 newspaper bills in the 1981 legislative session, many of which dealt with freedom of information issues. We've learned that good laws on open meetings are essential, but a continuing effort is needed to protect those laws.128

The preceeding are indicative of the need for protection of existing legislation, and revision of the laws to meet the changing needs of society.

Oregon legislation offers a unique solution to a recurring issue involving open meetings. The question of balance, exhaustively debated since the inception of open-meeting legislation, has, in Oregon, been answered by a compromise that promises neither the sacrifice of openness nor privacy.

Recognizing that some matters are best dealt with confidentially, yet opposing restrictions to openness, the Oregon legislature voted to allow "representatives of the news media" in closed executive sessions.129 With the exceptions of deliberations concerning the authority of a labor negotiator or hearings regarding the expulsion of a child from school, the news media may attend all executive sessions covered by the law. Governing bodies can, under the law, restrict what journalists report from such sessions. The law serves two objectives. First, reporters may gather background information. Although they may not use the information in reports, attending closed sessions allows reporters to form a more accurate perspective on later actions taken in public.130

Second, "the reporters present serve as 'watchdogs,' ensuring that the governing bodies do not stray into discussions properly held only in public sessions."131 Allowing newspersons to attend executive sessions establishes a middle ground between complete openness and total secrecy. No other state grants such a privilege.132

Legislation in the state of New York provides for a Committee on Open Government, one other uncommon approach to protecting the public's right of access. The committee serves as a monitor of all laws dealing with freedom of information. Its efforts as an advocate, adviser and lobbyist for open government have put New York "among the leaders in these situations."133 The committee, which has no enforcement powers, does draft reports to the legislature and make recommendations for needed changes in the laws. "Newspaper executives and public officials serve on this Freedom of Information Committee, which grants on request non-binding advisory opinions--500 in one year alone--on matters involving open meetings and other disclosure acts.134 In Connecticut, a similar provision provides for review of open-government legislation. Connecticut's board has investigative and subpeona powers and power to declare null and void actions by public agencies which violate the open-meeting law.135 The five-member commission often has members with media background. The first chairman was the late Herbert Brucker, a noted journalist.136 Speaking about the work of the commission, one member pointed out that "half of the things we resolved in the first year were about provisions that had been on the books since 1957--but there was no commission to enforce them. It was just a few newspapers with the money to go to court."137

Since 1976 all 50 states have had open-meeting laws on record.

Some of the problems of government secrecy have been addressed effectively through this legislation. Most meetings of most governmental bodies have been opened under the laws. Problems--primarily those dealing with the balance of wide coverage as opposed to restrictive, and those involving enforcement measures--continue to plague journalists and the public alike. A few states have adopted innovative approaches to resolving these conflicts, but by and large many conflicts remain unresolved.

Summary

The idea of government open to the people developed in England and was brought to this country by early colonists. Freedom of the press was an objective of the American Revolution and a concern of the framers of the Constitution. Although the Constitution and the Bill of Rights do not explicitly guarantee freedom of access, many believe that it is implied in the First Amendment right to freedom of the press. Without an explicit constitutional guarantee, the legal basis for access has developed almost entirely through state legislation. Prior to World War II there was little organized activity promoting open access to government. But the rise of the modern, urbanized, industrialized society accompanied by growth in big government led to a need for increased public knowledge of government.

A movement proclaiming the people's right to know was organized during the 1950s, with access to meetings of governmental bodies considered an important issue of the campaign. Professional journalistic organizations and citizens' groups led in promoting passage of legislation in states without such laws and strengthening the laws in states

with earlier open-meeting legislation. By 1976 each state had enacted open-meeting laws and federal legislation had been passed as well. Many laws have been poorly written and have not provided broad coverage. Laws revised or written after the mid-1970s contain many provisions set out in the federal legislation and in "model" laws. Generally the laws contain a statement of purpose, definition of terms, categories of coverage, provision for notice and minutes, and methods of sanction.

It is difficult to draw any generalizations regarding the laws since they vary greatly from state to state; they are constantly being updated; they are qualified by court decisions and attorneys general opinions; and they are affected by other legislation and state consititutional requirements.

In theory the laws have been designed to open access, in practice there often has been a disparity between the intent and application of open-meeting laws. Recurring problems involve exceptions and executive sessions which restrict access, and weak enforcement measures. Some states including, Oregon, New York and Connecticut have developed innovative laws that seek to provide solutions to these problems.

There are new issues: the recording and broadcasting of meetings and holding meetings by teleconference calls, which create new problems of access and opportunities for widening the scope of the legislation.

Certainly state open-meeting laws today are more comprehensive and have stronger enforcement measures than did their earlier predecessors. Today all fifty states have passed open-meeting legislation, indicating a general trend toward open-meeting laws that allow greater access to government.

Although much progress has been made toward effective open-meeting legislation, much work is left to be accomplished. There is ample opportunity for further study in both behavioral and legal research on topics concerning of freedom-of-information.

Professional organizations of journalists, citizens' groups, and the many individuals who have long worked toward a goal of open meetings as a means to freedom of information should be encouraged by the progress indicated in this study. They should also be challenged--challenged to resolve the conflicts of existing problems and challenged to grapple with the new issues now confronting comprehensive open-meeting legislation. Not withstanding important advances made, the continuing development of open-meeting laws remains a crucial consideration to those of the media, bar, government--all who seek the public welfare through open access.

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